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In the Supreme Court of the United States

OCTOBER TERM, 1937.

No. 48.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

MABEL S. ANDREWS,
Executrix of the Estate of Matthew Andrews,
Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED.

FRED R. SEIBERT,
St. Marys, Ohio,
Attorney for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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OPINION BELOW.

The opinion of the Court of Claims of the United States (R. 5-11) is reported in 17 Fed. Supp. 980.

JURISDICTION.

The judgment of the United States Court of Claims was entered February 8, 1937 (R. 11). Petition for writ of certiorari was filed May 8, 1937 (R. 11). Petition for Certiorari granted October 11, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the facts in this case the claim for refund filed February 2, 1933, as amended and amplified by claim for refund filed June 29, 1934, is sufficient compli-

ance with legal requirements to constitute a valid and timely claim for refund upon which this suit for the recovery of admitted overpayment of income tax for the year 1930 could be based.

STATUTES AND TREASURY REGULATIONS INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 15-17.

STATEMENT.

The facts were stipulated and the Court made and entered special findings of fact as part of its judgment (R. 5-8). The pertinent facts may be summarized as follows:

On or about March 15, 1931, respondent as Executrix of the Estate of Matthew Andrews, deceased, filed an individual income tax return for the calendar year 1930, showing a total tax liability of $12,800.30 which was duly paid in quarterly installments. The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations, $36,750.00 of which was erroneously reported as dividends received from The M. A. Hanna Company. This amount was derived from the sale of shares of stock of The M. A. Hanna Company received as a result of a recapitalization of the Company in November and December, 1929 (R. 6).

In December 1931, respondent was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends from The M. A. Hanna Company was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

On June 15, 1932, respondent filed with the Collector of Internal Revenue a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00 was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932 and paid with interest.

In a letter dated October 6, 1932, following conference with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge, at Cleveland, Ohio, that the amounts of cash received by respondent and other shareholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other shareholders.

On or about February 2, 1933, respondent filed a claim for refund in the amount of $995.52 based upon the grounds that losses had been sustained upon investments in stocks of certain corporations (R. 7). Subsequently, in 1936, this claim was rejected in part and allowed in part (R. 7).

On June 29, 1934, while the claim of February 2, 1933 was still under consideration respondent filed a claim for refund in the amount of $6,454.90, which amount included the $995.52 on which claim was filed on February 2, 1933. This claim for $6,454.90 was filed as an amendment and amplification of claim for refund filed February 2, 1933. The basis of this claim was that the amount of $36,750.00 had been erroneously included as a dividend instead of being reported as proceeds from the sale of shares of stock of The M. A. Hanna Company (R. 7-8), and, as above stated, included the amount of $995.52 on which claim was filed on February 2, 1933. Thereafter on September 4,

1934 a conference was held in the Commissioner's office on the issues set out in the above referred to claims. As a result of this conference and the consideration of the claims by the Commissioner a refund of $160.00 was allowed. By letter dated November 2, 1935 respondent was advised by the Commissioner that while the merits of the claim were allowable it would be disallowed in full for the reason that it did not, in the opinion of the Commissioner, meet the requirements of the law. The claim was officially rejected by the Commissioner on December 16, 1935.

ARGUMENT.

THE COURT OF CLAIMS PROPERLY HELD, UNDER THE FACTS IN THE CASE, THAT THE BASIS OF SUIT WAS INCORPORATED IN A TIMELY CLAIM FOR REFUND AS SUBSEQUENTLY AMENDED.

On February 2, 1933 respondent filed a claim for refund (R. 7). On June 29, 1934, while the claim of February 2, 1933 was being considered by the Commissioner, respondent filed a claim for refund stating therein as the basis, in addition to the basis stated in the claim of February 2, 1933, the grounds upon which suit was brought (R. 7-8). The second claim specifically related itself to the first and in addition to the grounds set forth in the first claim requested the Commissioner to make a further refund of the overpayment resulting from a discovery which he had made in 1932 within the statutory period in which a claim could have been filed. There was, therefore, no lack of notice to the Commissioner within the statutory period that respondent had overpaid her taxes. The Court of Claims held that under the circumstances the second claim was a proper amendment to the first and allowed recovery thereon.

The Court of Claims found as a part of its special findings of fact, that respondent was notified in December

1931, by letter from the Internal Revenue Agent in Charge at Cleveland, Ohio, that her return as filed reporting the sum of $36,750.00 as dividends was considered as correct with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C. and that should subsequent information be received which would materially change the amount of tax reported it would be necessary, under existing laws, to redetermine the tax liability.

In a letter dated October 6, 1932, following conferences with representatives of the Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge at Cleveland, Ohio, that the amounts of cash received by respondent and other stockholders of the Hanna Company represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the stockholders (R. 6). This information was not conveyed to respondent although a promise was made by the Internal Revenue Agent in Charge in his letter of December 1931, that should any facts be discovered which would change the tax liability, an adjustment would be made. The determination by the Commissioner that the dividends had been erroneously reported was made prior to the expiration of the statutory period within which a refund should have been allowed without the filing of a claim therefor, as provided in Section 322 (a) of the Revenue Act of 1928 (Appendix Paragraph 1).

The Court of Claims in allowing recovery in the instant case followed its previous decisions in the case of *Youngstown Sheet and Tube Company v. United States*, 79 C. Cls. 683, certiorari denied 293 U. S. 599 and *Con. P. Curran Printing Company v. United States*, 15 Fed. Sup. 153, and cites in support thereof the decisions of this Court in *United States v. Memphis Cotton Oil Company*, 288 U. S.

62; *United States v. Factors and Finance Company, Inc.*, 288 U. S. 89 and *Bemis Brothers Bag Company v. United States*, 289 U. S. 28, wherein amendments of claims were permitted under certain facts and circumstances which were not essentially different from those present in this case.

In the *Memphis Cotton Oil Company* case, *supra*, this Court in distinguishing between functions of a statute from the functions of a regulation stated (p. 71):

> "The function of the statute like that of limitations generally is to give protection against stale demands. The function of the regulation is to facilitate research."

In the *Memphis Cotton Oil Company* case this Court definitely rejected the narrow technical rule in regard to amendment of claims for refund, contended for by the government, and adopted a fair and liberal rule. The Court definitely stated that the requirements of regulations are merely to facilitate research and may be waived by the Commissioner or may be complied with by the taxpayer at any time before the rejection of the claim.

It is submitted that the functions of the statute have been complied with in the instant case since a claim for refund giving the Commissioner jurisdiction was filed within the statutory period and the functions of the regulations have also been met since the research necessary for the determination of the issue in this case was made by the Commissioner in 1932 prior to the expiration of the statutory period for the filing of an original claim.

When consideration is being given a claim for refund, all facts available to the Commissioner should be considered. *Tucker v. Alexander*, 275 U. S. 228; *United States v. Factors and Finance Company, Inc., supra*; *Bemis Brothers Bag Company v. United States, supra*, and *Lewis v. Reynolds*, 284 U. S. 281. The court in the *Lewis* case (p. 283) stated:

> "The ultimate question presented for decision upon a claim for refund is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability."

This Court in *The Memphis Cotton Oil Company* case, *supra* (p. 70) stated:

> "No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."

In the *Bemis Brothers Bag Company* case, *supra*, the court in holding that the Commissioner after considering all facts available to him in examining a claim cannot stop until justice has been done (pp. 35-36), stated:

> "Once let it be ascertained that the amount is determinable and all that follows is an incident. At that point discovery has gone on to such a stage that the Commissioner may not rid himself of the duty of pressing forward to the end. He cannot in good conscience be satisfied with less. There may be need to take the case out of one section and transfer it to another before revision will be complete. All this is quite irrelevant when once a wrong is brought to light. There can be no stopping after that until justice has been done."

Petitioner cites the case of *United States v. Henry Prentiss and Company*, 288 U. S. 73, as being contra to the decision of the court below in this case. An examination of the opinion of this Court in the *Henry Prentiss and Company* case, discloses that the principle enunciated in that case does not apply under the facts in the instant case.

The first and only timely claim for refund filed in the *Prentiss* case, *supra*, was for special relief under Sections 327 (d) and 328 of the Revenue Act of 1918, which claim was sought to be turned by amendment, after the statute

had run, to include a demand for refund which had come about through the undervaluation of invested capital with a consequent increase of the profits to be taxed. This Court (p. 84) in denying the right to amend the claim very specifically stated its reasons as follows:

> "If this amendment is permissible, a request for the exercise of a discretionary jurisdiction, will have been turned after the running of the statute * * * into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable with exceptions few and narrow * * * will have become justiciable at the end."

In the instant case the issue presented in the original timely claim was an error of fact or law or both and resulted in a new audit of the entire case. The controversy in the present case was at all times within the jurisdiction of the Court. Furthermore in the *Prentiss* case the taxpayer by agreement prior to the filing of the amendment abandoned all grounds for refund except special assessment.

The petitioner in its brief has cited *Bryant Paper Company v. Holden*, 63 Fed. (2nd) 370 (C. C. A. 6th), certiorari denied 290 U. S. 631, *United States v. Richards*, 79 Fed. (2nd) 797 (C. C. A. 6th), certiorari denied 297 U. S. 718, *Swedish Iron and Steel Corporation v. Edwards*, 1 Fed. Supp. 335 and *New York Trust Company, Executor, v. United States of America*, 87 Fed. (2nd) 889.

In the *Bryant Paper Company* case, *supra*, a claim was timely filed. Before the claim was rejected but after the statutory period for filing a new claim had expired another claim was filed asking for refund on a ground not in issue prior thereto. The second claim did not seek to relate itself to the first and appeared in the record as an independent claim. In the instant case the amended claim specifically related itself to the original and timely claim and

covered an issue which had previously and within the statutory period been determined by the Commissioner.

In the *Richards* case, *supra*, a general claim had been filed within the statutory period. Later a specific claim was filed based on reallocation of dividends, an issue not in existence at the time of the filing of the general claim. This claim was rejected with permission to reopen it upon presentation of further evidence relative to allocation of dividends. When the taxpayer requested reopening he urged also an additional and unrelated ground, namely that he was entitled to a deduction of his share of excess profits taxes paid by two partnerships of which he was a member. The Court held that the letter of the Commissioner rejecting the second claim barred further amendment except as limited in such letter and in its opinion on page 801 stated:

> "The Commissioner's rejection letter of June 3, 1925, was concededly not a final rejection of the claim based upon the disallowance as a deduction of corporation dividends. It was qualified by permission to reopen in the event that the allocation of dividends should thereafter be definitely determined."

The facts in the *Richards* case clearly distinguish it from the instant case.

An examination of the facts in the *Swedish Iron and Steel Corporation* case, *supra*, discloses that a timely claim for refund was filed and rejected on its merits. Later and after the statutory period for the filing of a new claim had expired, letters were filed asking for a reaudit and reconsideration for the year involved. The Court held that since the letters were filed after the rejection of the original claim and after the expiration of the statutory period, such letters could not constitute an amendment to the already rejected claim. It is respectfully submitted that the facts and principle involved in the *Swedish Iron and Steel Corporation* case are not comparable in any respect to those in the instant case.

In the *New York Trust Company* case, *supra*, a timely claim for refund had been filed and allowed in full. Later an alleged amendment was filed based upon claim for deduction of taxpayer's proportionate share of excess profits taxes. The Court held that even if the timely claim had not been rejected at the time of the filing of the alleged amendment, to determine the merits of the amendment the Commissioner would be required to examine the records of another taxpayer and would be led into fields too far removed from those which the original claim directed. In the instant case the Commissioner and his agents had of their own volition determined the correct tax basis on the issue in suit. When the amendment to the original timely claim was filed the Commissioner was not led into strange and unexplored paths because within the statutory period he had determined the correct basis for the determination of the tax liability. The amendment was simply an adaption of the relief to a case already determined by the Commissioner.

The refusal of the Commissioner to allow the admitted overpayment in the instant case as indicated by his letter of November 2, 1935 (R. 3) was based upon plaintiff's failure to comply with Treasury Decision 4265 Cumulative Bulletin VIII-1 page 110. The statute, Section 322 of the Revenue Act of 1928, *infra*, was not changed in substance by corresponding sections of subsequent revenue acts which were enacted after the effective date of Treasury Decision 4265.. It is submitted that since there has been no change in the statutory requirement as to filing of a claim for refund of overpaid taxes the said Treasury Decision 4265 is of no force and effect in the instant case. This and other courts have refused to follow treasury decisions which place an unreasonable interpretation on an unambiguous section of the law.

The Supreme Court of the United States in the case of *Manhattan General Equipment Company vs. Commissioner,* 297 U. S. 129, 56 S. Ct. 397, very succinctly stated in its opinion (p. 134) the differentiation between departmental regulations and the statutes as follows:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. * * *"

The United States District Court for the Northern District of Oklahoma in *Lloyd Staton, Executor, vs. United States of America,* 9 Fed. Supp. 428, held that where a timely informal claim was filed and later amended on December 9, 1929, after the expiration of the statutory period of limitation for filing new claim, and subsequent to May 1, 1929, the effective date of Treasury Decision 4265, such claim was sufficient compliance with the statute to entitle the plaintiff to recover overpaid taxes.

It is submitted that the only legal requirement to authorize the Commissioner to refund overpaid taxes is that a claim be filed within the statutory period. Such requirement has been fully complied with in the instant case when claim for refund was filed February 2, 1933.

The necessary requirement for filing suit for recovery of overpaid taxes has been enunciated by this Court in the case of *Factors and Finance Company vs. United States,* 56 Fed. (2d) 902 (affirmed on certiorari 288 U. S. 89, 53 S. Ct. 287) (p. 906) as follows:

"However if the taxpayer desires to protect his right to a judicial review of the Commissioner's action, if he should not determine that a refund should be made, he should set forth the facts upon which he relies as entitling him to a refund. Such procedure on the part of the taxpayer is required by Section 3226 Rev. St. * * *"

It is submitted that the requirements of Section 3226 of the Revised Statutes have been met in the instant case since the limitation set forth in that section is that prior to filing suit a claim setting forth the specific basis therefor must have been filed. The claim filed June 29, 1934 definitely and specifically supplied the facts on which this suit was brought, which facts the Commissioner had acted upon almost two years prior thereto, such action having been set forth in letter dated October 6, 1932 (R. 6).

By the Commissioner's refusal to refund the admitted overpayment in this case respondent will ultimately be subjected to a further tax on the amount here in issue, which was erroneously taxed as dividends. Under the ruling of the Commissioner as set forth in his letter of October 6, 1932 (R. 6), the base of the new stock received upon the exchange set forth in (R. 6), will be reduced in the aggregate amount of the adjustment here under consideration. This, in effect, is a double tax on the same item which we submit was never contemplated or intended by any of the Revenue Acts. Respondent contends that such double taxation has been condemned by the Supreme Court of the United States in the case of *Bull vs. United States,* 295 U. S. 247, 55 S. Ct. 695. In the *Bull* case, an estate tax was paid as a result of including certain amounts in the gross estate of the decedent. Later the same amounts were included as income of the estate and an income tax paid thereon. In the instant case a tax was paid on the erroneous inclusion of an amount as dividends which same amount

will, as the result of having to reduce the base upon subsequent sale or disposition of the stock, be subject to a further tax. The Supreme Court in the *Ball* case, *supra,* permitted recoupment of the erroneously and illegally collected estate tax after the statute had expired on the ground that the retention of the money was "against morality and good conscience." The court in its opinion (pp. 260-261) stated, in part, as follows:

> "If that which the sovereign retains was unjustly taken in violation of its own statute the withholding is wrongful. Restitution is owed the taxpayer.
>
> "* * * The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of fraud of their agent. *United States v. State Bank,* 95 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the *State Bank* case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund.' * * *"

CONCLUSION.

In conclusion respondent submits:

1. That the amendment of June 29, 1934 including the basis of this suit being filed with the Commissioner prior to the rejection of the original claim was timely filed and was a valid amendment to the original claim filed February 2, 1933.

2. That the Commissioner in ruling on the issue herein involved by letter dated October 6, 1932 and in considering the amended claim of June 29, 1934, on its merits, waived any defects in or any objections to the timely claim

for refund as amended and can not now rely on such alleged defects as a defense to recovery in court.

3. That the refusal of the Commissioner to refund the admitted overpayment of tax will ultimately subject this plaintiff to an adjustment of the base of the stock on the subsequent sale or disposition which will be equivalent to a duplicate tax on the amount of adjustment involved in this action.

4. This action is based on a valid and proper claim for refund.

5. The judgment of the United States Court of Claims should be sustained.

Respectfully submitted,

FRED R. SEIBERT,

Attorney for Respondent.

Dated November 29, 1937.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791, 861:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

Treasury Decision 4265, VII-1 Cumulative Bulletin Page 110:

* * * * *

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

* * * * *

Treasury Regulations 77, Revenue Act of 1932, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*— Claims by the taxpayer for the refunding of taxes,

interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 1257.

* * * * *

Treasury Regulations 74, Revenue Act of 1928, Article 1254:

ART. 1254. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. A separate claim on such form shall be made for each taxable year or period. All facts relied upon in support of the claim should be clearly set forth in detail under oath.

* * * * *